



Governor Brian Schweitzer

Montana

Department of Labor and Industry

Business Standards Division

ECONOMIC AFFAIRS IC
October 6, 2011
EXHIBIT 16

September 29, 2011

Rep. Tom Berry, Chair
Economic Affairs Interim Committee
Montana Legislature
State Capitol
Helena MT 59620

Subject: Answers to HB525 Questions re: Board of Medical Examiners

Dear Rep. Berry and Members of the Committee:

Below are the answers to the questions your committee has posed to the Board of Medical Examiners relating to HB 525:

1. What is the public health, safety, or welfare rationale for licensing and regulating your profession/occupation?

The members and staff of the Board of Medical Examiners believe in the mission of the Board: "Protect the public from incompetent, unprofessional, and unethical health providers." We believe that is a strong rationale for the three aspects of our work—licensing, regulation and, for a small minority, discipline of the health care providers under our authority.

Put another way, it is critical that Montanans trust their health care provider. The Board of Medical Examiners works to insure that trust is earned, by evaluating the education, knowledge, character and fitness of each licensee. When that trust is broken, the Board also is there to address the situation and affect the necessary changes.

To emphasize the durability of that mission, let me quote from one of the first annual reports of the Board, made to Governor Joseph Toole in December of 1892:

"It is well understood that...persons who may require the services of a physician in an emergency, or those who may have to send for a doctor in a community where they are unacquainted, may be assured they will secure the services of those who are accomplished and qualified physicians, and not run the risk...of placing their health and the lives of themselves and their families in the hands of pretenders who do not possess the essential qualifications to practice medicine."

In far more recent times, the legislature has stated clearly that the practice of medicine in Montana is a privilege, not a natural right, and that the regulation of the practice of medicine is necessary to ensure the health, happiness, safety, and welfare of the people of Montana.(See full citation below.)

State laws also are very clear that the practice of medicine and other health professions in Montana either require a license to practice or a legal exemption from that requirement.

37-3-101. Purpose. It is hereby declared, as a matter of legislative policy in the state of Montana, that the practice of medicine within the state of Montana is a privilege granted by the legislative authority and is not a natural right of individuals and that it is deemed necessary, as a matter of such policy and in the interests of the health, happiness, safety, and welfare of the people of Montana, to provide laws and provisions covering the granting of that privilege and its subsequent use, control, and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized, and unqualified practice of medicine and to license competent physicians to practice medicine and thereby provide for the health needs of the people of Montana.

2. If your profession is not licensed, what public protection would be lost?

Without licensing and regulation, anyone could claim to be a practitioner of medicine or of the other professions the Board of Medical Examiners regulates. The market would provide the only limitations on providers, allowing unscrupulous or unethical individuals to place profit over patient care and patient safety. The Board of Medical Examiners believes that a system of licensing and regulation increases the credibility of health professionals with the public, and increases the public's trust in those professionals. We also believe the Board plays an important role in making sure health professionals in Montana deliver high quality services to their patients, clients and consumers.

Additionally, were it not for the Board of Medical Examiners' disciplinary process, citizens would be left on their own to pursue civil remedies against health professionals they believe have engaged in incompetent, unprofessional or unethical health care practices. This would be extremely difficult, as lay people do not understand the body of knowledge necessary to become a health professional. Nor might they understand the training and credentials required.

3. If a license is necessary (for health, safety, or welfare), does the profession/occupation need a board for oversight? If yes, please explain why and describe the purpose of creating a board.

Yes. As with any profession that requires a large body of knowledge and specific training, only fellow health professionals truly can evaluate whether an individual meets the standards of his or her profession. The Board of Medical Examiners includes experienced professionals in the professions the Board oversees.

As for the purpose of creating a board, the Montana Territorial Legislature addressed that issue in 1889 by passing an act to regulate the practice of medicine and punish persons who violated provisions of that act.

That act instructed the Governor to appoint seven "learned, skilled and capable physicians" for a new Board of Examiners that would certify qualified physicians and surgeons. The act also required every person wishing to practice medicine or surgery within the territory to comply with the new law. The board was empowered to charge a license fee of \$15 and to refuse or revoke a certificate for "unprofessional, dishonorable,

or immoral conduct, or to anyone who may publicly profess to cure, or treat disease, injury or deformity in such a manner as to deceive the public."

The law also proscribed stiff fines and significant jail sentences for violators who practiced medicine without a license.

Today, the Board's role is to oversee the licensing of medical professionals, see that they provide an appropriate standard of patient care and conduct themselves in a professional manner, and provide a disciplinary process for medical professionals who fail to meet those standards.

4. Does the board deal with unlicensed practice issues? If yes, what types of issues?

Yes. This is an important function. The licensing process assures that a health professional has received the necessary training to be competent in his or her practice. Without licensing, we as regulators do not know the level of a person's training or body of knowledge.

It is worth noting that the Board of Medical Examiners addresses very few cases of unlicensed practice. As of June 30 of this year, the Board has more than 8,000 licensed professionals on file. In a typical year, the Board issues fewer than ten "cease and desist" letters for unlicensed practice. Injunctions against individuals are even more uncommon. One review of Board actions from 2001 to 2008 showed a total of only two injunctions during that seven-year period.

An issue of unlicensed practice could be a simple misunderstanding, in which a person is reported to the board because he or she mistakenly has been named as a certified professional in a published article. It could involve an individual advertising himself or herself as a "nutritionist" as a generic label when, in fact, he or she has no license in that field and, hence, is not legally entitled to use that term. Or it could be as serious as a person essentially acting as a physician—recklessly diagnosing and treating patients—without a license. Or it might involve someone acting in a blatantly fraudulent manner making false claims about health services.

5. People who are not licensed but are qualified in an occupation or profession may feel that a licensing board is preventing them from earning a living. What is your response?

A similar question emerged in 1892, three years after the Board of Medical Examiners was created by the territorial legislature. In that year, the Montana Supreme Court ruled that "a statute regarding the practice of medicine and providing for the examination and issuing of certifications to persons desirous of practicing the same cannot be deemed to create unjust discrimination." (Craig v Board of Medical Examiners 121 MT 203.)

Today, as in 1892, the Board of Medical Examiners focuses on the education, training and experience of each health care provider we license. Without the oversight that licensing and regulation provides, anyone could make a false claim of knowledge, training or experience, thus potentially putting the public at risk.

The Board of Medical Examiners operates with no quotas or limits on the number of licensed professionals, whether by population, geography, political jurisdiction or profession. The field is open to anyone with the proper qualifications.

In addition, as noted in our response to Question #4, the Board of Medical Examiners routinely addresses only a handful of unlicensed practice issues per year. In

FY 2009, the Board took action in only 3 unlicensed practice cases. In FY 2010, we acted in 8 cases. In FY 2011, there were 5.

6. How does your board monitor bias among board members toward a particular licensee, an applicant or a respondent (to unlicensed practice)? How does your board monitor bias toward a particular profession/occupation, if more than one profession or occupation is licensed by the board?

The Board of Medical Examiners relies on its members to announce any association or circumstance that might lead to bias or the perception of bias when addressing the tasks put before it. In addition, the board has three built-in checks on potential bias.

First, the board is diverse. Of the 13 seats with voting power (including the newly-named Acupuncture representative) no profession holds enough seats to create a quorum. Nor can one profession's members win a majority if all members vote.

Second, the board includes two "public member" seats which are not held by licensed health providers. We believe this provides even more diversity, as our "public members" have no vested interest in any of the professions the board oversees.

Third, when a complaint enters the compliance process, the two panels involved—Screening and Adjudication—are comprised of different members of the board. This insures that a board member who is involved in screening a case is not involved in adjudicating that same case.

7. Does the profession or occupation have one or more associations that could provide oversight without the need for a licensing board? Why not use the association as the oversight body?

The Board of Medical Examiners sees its role as very different from the roles played by the professional associations to which many of our licensees belong. The board's role is to protect the public through its own rules and through the statutes it enforces. In contrast, the professional associations work to promote, enhance and advocate on behalf of their respective professional members. At this time, the Board of Medical Examiners is unaware of any intention or effort by a professional association to share—or assume outright—the duties assigned to the board by statute and/or rule.

8. Is a licensing board needed in order for the practitioner to bill to receive insurance (for example, health insurance)? If so, is there an alternate method for billing that may be recognized rather than having a license or being regulated by a licensing board?

The health professionals overseen by the Board of Medical Examiners must be licensed in order to bill a "third party payer" such as an insurance provider. In preparing this report, BOME found the following information from Montana's three large third party payers:

- 1) *Blue Cross Blue Shield of Montana states in its Provider Network Participation Policy that it contracts only with providers licensed by the state and that such license is necessary to participate in BCBSMT plans.*
- 2) *New West Health Services requires detailed information about the license status and history of its potential providers.*

- 3) *Allegiance Benefit Plan Management confirms that all of its providers must be licensed by the state in order to bill.*

Because of these requirements, a licensing authority is necessary.

9. What are the benefits of a board being part of the licensing and discipline process instead of the department handling one or both?

The Board of Medical Examiners is made up primarily of experienced and knowledgeable health professionals. As such, board members have a clear understanding of the education, training and knowledge base needed to qualify as a professional in their respective areas of expertise. They also understand the terminology of their respective professions. Therefore, it is appropriate and wise for the board to set the standards of licensing and professional practice, to emphasize standards of care and to enforce discipline when needed.

In terms of licensing, the vast majority of license applications that come to the Board of Medical Examiners are "routine" and are handled exclusively by BOME staff without the need for board review. In addition, staff may issue licenses to "non-routine" applicants—those whose applications contain minor deviation from standards—in certain proscribed situations. For the vast majority of applicants, this makes for a more efficient licensing process.

"Non-routine" applications that have more serious deviations from standards are referred to individual board members or the full board for review.

10. Is there an optimum ratio between licensees, board size, or public representation?

The Board of Medical Examiners cannot speak to the larger issue of an "optimum" ratio for all boards. The Board can report that its size—14 members—works well, in terms of both license review and the disciplinary process. The Board also takes pride that the various professions it oversees are represented by voting members. The Board also believes in the value of having two public members with voting privileges, as well as a non-voting liaison representing Physician Assistants.

Other than the addition of an acupuncturist to the Board, there have been no formal discussions about expanding its membership or changing its composition. However, one informal concern has been raised while preparing this response. It involves the burden placed upon the physician members of the Board in the compliance process.

In a typical two-month cycle between full Board meetings, the BOME's Screening Panel receives 30-40 complaints, the vast majority of which involve physicians. As a result, most of the burden of reviewing those complaints—especially in preparation for Screening Panel meetings—falls on the physician members of the Board. This means the physician Board members can spend much more time on BOME business than their non-physician counterparts.

At this time, the Board offers no proposal to address this concern.

11. If a board's purpose includes protecting public welfare, would that consumer protection be handled better by the Attorney General's office than by a board? (In other words, is there a value in a disinterested third party? If yes, why? If not, why not?) Who should be responsible for monitoring fraud within the profession or occupation?

The Board of Medical Examiners believes the specialized knowledge required of health professionals makes it appropriate for health professionals to regulate other health professionals. When circumstances require disciplinary action, the Board has tremendous faith in both the compliance specialist assigned to it by the Business Standards Division and the legal staff who prosecute offenders before Department of Labor and Industry hearing examiners.

12. If boards have overlapping scopes of practice, should there be a third-party to determine whether there is intrusion into the others' practice? If so, who should be the judge? If not, why not? Should each be allowed to operate on the other's turf without repercussions?

Licensed professionals should not exceed their scope of practice. Such conduct would be considered unprofessional and would be subject to discipline by the Board which regulates that individual's practice. If the conduct entered into another board's area of professional expertise, then the second board would be justified in taking action for unlicensed practice. In many cases, the best course of action—and that recommended by the Board of Medical Examiners—is for the individual to seek an additional license to avoid a scope of practice issue.

The Board of Medical Examiners recognizes that issues such as scope of practice will continue to arise periodically. The Board has found that when they do arise, we have been able to work cooperatively with other regulatory boards. We believe cooperation can resolve issues and we have confidence in the strong working relationships among boards and staff within the Health Care Licensing Bureau.

13. Should the board have the ability to limit use of certain terminology to only a licensee?

Essentially, this is a "truth in advertising" issue that reflects both factual accuracy and the trust relationship between provider and patient/client. In Montana, certain terms relating to professionals and their medical specialty are specifically defined in law. For instance, the term "acupuncturist" has a specific legal definition under MCA 37-13-103.

Another statute (MCA 37-25-102) defines a "nutritionist" as a person who either is licensed as such or "has satisfactorily completed a baccalaureate and master's or a doctoral degree in the field of dietetics, food and nutrition, or public health nutrition conferred by an accredited college or university."

The Board of Medical Examiners is the body best able to determine whether health care professionals are truthful in presenting their professional status to the public, whether through advertising or through claims about their practice. In addition, the public expects health care professionals to be truthful if they choose to use the legally recognized name of a specialty.

The Board looks forward to meeting with you and your committee in person on October 6.

Sincerely,



Ian Marquand, BOME Executive Director